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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

314-614

No. [redacted] 47

A. Y. OATES AND ALMENA OATES, HUSBAND AND WIFE,
Petitioners,

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND MOTION TO CONSIDER THE PETITION ON THE TYPEWRITTEN COPY OF THE RECORD.

W. B. DICKENSON,
W. B. DICKENSON, JR.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 927

A. Y. OATES AND ALMENA OATES, HUSBAND AND WIFE,
Petitioners,

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION.

To the Honorable Justices of the Supreme Court of the United States of America:

Come now the above named petitioners, A. Y. Oates and his wife, Almena Oates, by their attorneys W. B. Dickenson and W. B. Dickenson, Jr., and respectfully show unto the Court that the attached petition for a Writ of Certiorari contains all of the information which in their opinion is necessary for this Court to consider for the purpose of determining whether or not the writ should issue and that it will not be necessary to refer to the complete record.

That the petitioners are filing herewith a typewritten copy of the complete record which consists of seven hundred and thirteen pages; this cause having been taken by appeal to the Supreme Court of the State of Florida six times which necessitated a very voluminous record that

petitioners estimate that it will cost somewhere in the neighborhood of Two Thousand Dollars ($2,000.00) to print the entire record; that the cost of printing this petition, which is very lengthy by reason of the large number of exhibits attached thereto, and the expense of printing both this application and the record is almost prohibitive; that the amount involved is an original alleged indebtedness of Twelve Hundred Dollars ($1200.00) together with accumulated interest thereon and the cost if petitioners are required to print the entire record is out of proportion to the amount involved.

The premises considered the petitioners respectfully pray that this Honorable Court consider the application for Writ of Certiorari on the printed application and should the Court desire to refer to the original complete record permit the use of the typewritten copy for purposes of reference and in the event the writ is issued the petitioners will immediately thereupon cause to be printed the entire transcript of record as required by the rule.

Respectfully submitted,

W. B. DICKENSON,
W. B. DICKENSON, JR.,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 927

A. Y. OATES AND ALMENA OATES, HIS WIFE,
Petitioners,

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION.

To the Honorable Justices of the Supreme Court of the United States of America:

Now comes A. Y. Oates and Almena Oates, his wife, petitioners in the above entitled cause by W. B. Dickenson, Jr., their attorney, and represent unto this Honorable Court that upon a hearing of the cause in the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County, In Chancery, wherein New York Life Insurance Company, a corporation, was complainant and these petitioners A. Y. Oates and Almena Oates, his wife, were respondents, a judgment and final decree was entered in favor of the said complainant and against these petitioners ordering and directing the foreclosure of a mortgage on certain property owned by these petitioners as an estate by entireties and occupied by these petitioners as their

homestead, directing the sale of the said property to satisfy certain alleged indebtedness which was secured by the said mortgage.

The said decree and judgment of the said Circuit Court bearing date of March 1, 1940, as will more fully appear by a true copy of the said decree hereto appended and marked Exhibit "Y".

Your petitioners further represent that they entered an appeal from the said judgment and decree and perfected an appeal from said order and judgment of the said Circuit Court to the Supreme Court of the State of Florida, all of which will more fully appear by reference to the Transcript of Record filed, and said appeal was submitted to the said Supreme Court of the State of Florida at the June Term, A. D. 1940, of the said Supreme Court of the State of Florida. That afterwards at the said term of said Appellate Court, to-wit, on the 12th day of November, A. D. 1940, the said Appellate Court filed its opinion and rendered its judgment in said cause affirming the judgment and order of the said Circuit Court. All of which will more fully appear by reference to a true copy of the opinion and judgment of the said Supreme Court of the State of Florida hereto appended and marked Exhibit "Z".

Your petitioners, therefore, present and petition that a Writ of Certiorari be granted to the Supreme Court of the State of Florida in said cause, directing the said Appellate Court shall certify to the Supreme Court of the United States of America said cause for review and determination.

And, for reasons therefor, your petitioners represent that said cause involves a question of such importance in relation to the property rights of married women and the manner and means whereby property rights of married women may be conveyed under the laws of the State of Florida; and that in determining these questions it became and is necessary to place a construction upon the manner

and means, purposes and intention of Article Fourteen, Section I of the Constitution of the United States of America, and also Article 5 of the Constitution of the United States of America; the property rights of the petitioner, Almena Oates, under the said two Articles of the Constitution of the United States having been denied to your petitioner, Almena Oates, by the judgment and decision of the Trial Court and the Supreme Court of the State of Florida in the judgments hereinbefore referred to, wherefore a Writ of Certiorari should be granted in this cause and the same certified to the Supreme Court of the United States of America in order that this Honorable Court may review and determine the rights of your petitioners and make such order as may be necessary to secure for your petitioners their constitutional rights.

All of which will more fully appear by reference to a Summary of the case hereto attached and made a part of this petition as well as the Statement particularly disclosing the basis on which it is contended this Court has jurisdiction to review the judgment of the Supreme Court of Florida, also hereto appended and the questions presented for consideration of this Court hereto appended, together with the exhibits thereto appended.

Your petitioners therefore pray that pursuant to the provisions of the Act of Congress of February 13, 1925, being Chapter 229, 43 Stat. 936 (as amended). The section of the Judicial Code relied upon being "Section 237 (b)", a Writ of Certiorari may be granted in this cause.

Respectfully submitted,

W. B. DICKENSON,
W. B. DICKENSON, JR.,
Attorneys for Petitioners.

STATE OF FLORIDA,
County of Hillsborough:

Before the undersigned authority personally appeared W. B. Dickenson, Jr., attorney for A. Y. Oates and Almena Oates, petitioners named in the above and foregoing petition, who, after being first duly sworn according to law, deposes and says that he is the attorney representing the petitioners and that on the 2nd day of April, A. D. 1941, he did ship by Railway Express to Hon. Bradford C. Williams, Attorney at Law, Lakeland, Florida, one of counsel for New York Life Insurance Company, a corporation, a carbon copy of the petitioners' petition for Writ of Certiorari and a copy of the Transcript of Record in the above entitled cause, the original copy of which is about to be filed in this Honorable Court upon application for a Writ of Certiorari to the Supreme Court of the United States of America.

Dated at Tampa, Hillsborough County, Florida, this 2nd day of April, A. D. 1941.

W. B. DICKENSON, JR.,
Attorney for Petitioners.

Sworn to and subscribed before me this the 2nd day of April, A. D. 1941.

LEILA MCGEACHY,
[SEAL.] *Notary Public, State at Large.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 927

A. Y. OATES AND HIS WIFE, ALMENA OATES,
Petitioners,

vs.

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION.

SUMMARY AND STATEMENT OF CASE.

This cause came to trial on the Second Amended Bill of complaint wherein the complainant, New York Life Insurance Company, a corporation under the laws of the State of New York, duly authorized and licensed to transact business in the State of Florida, set forth that the defendants, A. Y. Oates and his wife, Almena Oates, for valuable consideration became indebted unto Telfair-Stockton and Company, a corporation, organized and existing under the laws of the State of Florida, in the principal sum of Fifteen Thousand ($15,000.00) Dollars and to evidence said indebtedness made and executed unto said Telfair-Stockton and Company, a corporation, one certain promissory note dated June 1, 1926, payable to the order of said corpora-

tion. Further that said A. Y. Oates and his wife, Almena Oates, on the same date, being so indebted, and being owners of the hereinafter described real estate and in possession thereof, did, in order to secure the payment of said promissory note, grant, bargain, sell and convey to the said Telfair-Stockton and Company, a corporation, in fee simple the following described real estate situate in the County of Polk, State of Florida, to wit:

> Lots numbered Twenty-two (22) and Twenty-three (23) in Block numbered Two (2) of Casa Bella, a subdivision of Lakeland, Florida, according to map or plat thereof filed and recorded in Plat Book 8 at Page 1, public records of Polk County, Florida, said subdivision being sometimes referred to as Everhart and Barnes Second Addition to Lakeland, Florida;

subject, however, to a condition of defeasance upon the payment of the principal and interest as therein set forth and upon compliance with the covenants, terms and conditions then and there stipulated according to the tenor and effect of said promissory note and of said mortgage deed, which said deed, dated June 1, 1926, and duly witnessed was likewise duly acknowledged under date of June 1, 1926, and thereafter delivered to Telfair-Stockton and Company as aforesaid, and was on June 18, 1926, duly recorded in Mortgage Book 195, Page 40, in the public records of Polk County, Florida, all as will appear by the original mortgage deed (R. 33-40).

Further, that on or about June 22, 1926, Telfair-Stockton and Company, a corporation, for valuable consideration sold and duly and regularly endorsed and delivered said note to New York Life Insurance Company, a corporation, which said assignment was duly witnessed and acknowledged under said date and recorded June 26th, 1926, in Assignment of Mortgage Book 253, at page 215, of the public records of Polk County, Florida.

It is further set forth therein that A. Y. Oates and his wife, Almena Oates, and each of them failed to perform and comply with various covenants in said mortgage deed and the note thereby secured setting forth a default in payment of an installment upon the principal debt which matured December 1st, 1929, also default in payment of interest upon the principal debt which matured on said date and default in payment of taxes levied against said mortgaged property thereby the right of foreclosure of said mortgage deed accrued to said New York Life Insurance Company, a corporation, and therein and thereby sought to foreclose said mortgage deed, all of which will more fully appear by reference to the Second Amended Bill of Complaint as appears in Transcript of Record, pages 10-52.

A. Y. Oates and his wife, Almena Oates, filed an answer to the aforementioned Bill of Complaint admitting that A. Y. Oates became endebted to Telfair Stockton and Company in the sum alleged, but denying that Almena Oates became so endebted and further denied that she was endebted to the said Telfair Stockton and Company or to the New York Life Insurance Co. and further denied that the said Almena Oates consented to the creation of said indebtedness or ever acknoweldged the same, or made any of the covenants or agreed to the same or acquiesced in the same.

It was further set forth that both Telfair Stockton and Company and New York Life Insurance Company had actual and constructive knowledge that although the above described property was homestead property the same was held by A. Y. Oates and his wife, Almena Oates, by the entirety.

It is further set forth that A. Y. Oates and his wife, Almena Oates, were before June 1, 1926, husband and wife, residents of the State of Florida and together with a minor child resided on the property described hereinabove, and

further that Almena Oates did not sign the note and mortgage in the presence of the witnesses who signed said mortgage, and that the said Almena Oates did not appear before the Notary Public whose certificate is attached to said mortgage and did not acknowledge said instrument in the presence of said Notary, or in the presence of any other Notary, at the time she signed the same or at any other time, and that the said Almena Oates received no part of the proceeds of said note and mortgage and did not know of their existence until shortly before the foreclosure suit was brought, all of which will more fully appear by reference to the answer appearing in Transcript of Record, at pages 53-61.

The case was referred to a Special Master for the purpose of taking testimony and on the 26th day of August, 1931, the Honorable Harry G. Taylor, Judge of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County, made and entered a final decree in the said cause finding that the allegations contained in the Second Amended Bill of Complaint were true and that the said mortgage was a valid and subsisting mortgage, and that New York Life Insurance Company was entitled to enforce the lien thereof and further entitled to the relief as prayed, all of which will more fully appear by reference to a copy of said final decree hereto attached and marked Exhibit "A".

Thereupon A. Y. Oates and his wife, Almena Oates, entered an appeal to the Supreme Court of the State of Florida on September 29th, 1931 (R. 257), from the final decree and from the order denying a rehearing on the ground of newly discovered evidence as to the execution and acknowledgment of the mortgage by Mrs. Oates, and the court having denied the rehearing on the ground that the said proffered testimony was inadmissible by reason of a negotiation of the said mortgage and of the note

thereby secured to an innocent party prior to the maturity thereof and without notice of any defects therein (R. 256-257). On said appeal to the Supreme Court of the State of Florida, said court in the June term of 1933 in an opinion filed January 4th, 1934, reversed the decree appealed from and remanded the cause for further proceedings in the lower court, as will more fully appear by reference to a copy of the said opinion hereto attached and marked Exhibit "B".

Thereupon New York Life Insurance Company, a corporation, filed its petition in the Supreme Court of the State of Florida for a rehearing on the said matter and in the January term of said court of 1934 in an opinion filed February 7, 1934, said court denied the petition for rehearing, which will more fully appear by reference to a copy of said opinion hereto attached and marked Exhibit "C".

Thereafter the Honorable H. C. Petteway, Judge of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County, referred said cause to the Special Master for the purpose of taking further testimony and evidence in said cause according to the mandate of the Supreme Court of the State of Florida (R. 301).

At the conclusion of the taking of testimony as above the Honorable H. C. Petteway, Judge of the said court, made and entered his final decree on the 3rd day of August, 1934, dismissing the Bill of Complaint in said cause on the merits, as will more fully appear by reference to a copy of said decree hereto attached and marked Exhibit "D".

Thereupon New York Life Insurance Company, a corporation, filed its petition for rehearing (R. 404-408), and on the 14th day of August, 1934, the Honorable H. C. Petteway, Judge of said court, entered an order denying the said petition for rehearing, as will more fully appear by

reference to a copy of said order hereto attached and marked Exhibit "E".

The New York Life Insurance Company entered its appeal to the Supreme Court of the State of Florida from said final decree and from the said order denying the petition for rehearing on the 2nd day of October, 1934.

Thereafter in the January term, 1935, the Supreme Court of Florida, in its opinion filed April 5, 1935, by a divided court, i.e., three justices being of the opinion that the decree of the Circuit Court should be reversed for further proceedings and three members of said court being of the opinion that the decree should be affirmed, affirmed the decree of the Circuit Court, as will more fully appear from a copy of said opinion hereto attached and marked Exhibit "F".

Subsequent thereto on re-argument of said cause in the January term, 1935, the Supreme Court of the State of Florida filed its opinion reversing said cause for further appropriate proceedings, as will more fully appear by reference to a copy of said opinion hereto attached and marked Exhibit "G", in which opinion four judges concurred and three judges dissented, a copy of the two dissenting opinions being also hereto attached and marked Exhibits "H" and "I".

Thereupon in the same January term, 1935, the Supreme Court of Florida on April 5, 1935, filed its opinion affirming the decree of the said Circuit Court, as will more fully appear by reference of a copy of the said opinion also hereto attached and marked Exhibit "J".

On April 16, 1935, New York Life Insurance Company petitioned the Supreme Court of the State of Florida for an extension of time within which to file its petition for rehearing (R. 452-453), which said petition was granted and on May 8th, 1935, the petition for rehearing was filed (R. 454), and thereafter on the 27th day of May, 1935, in

the January term, 1935, in the Supreme Court of the State of Florida, said court entered its order granting the said petition for rehearing (R. 472), and thereafter in the June term of said court in an opinion filed January 13th, 1936, the Supreme Court of the State of Florida reversed the final decree entered by the Circuit Court without prejudice and remanded the whole cause to the said Circuit Court for further consideration and disposition after a full rehearing and reconsideration of all of the issues of law and fact in the light of the opinion of said Supreme Court approved by a majority of said court, as will more fully appear by reference to said opinion hereto attached and marked Exhibit "K", and also appearing by a copy of the order entered by said Supreme Court hereto attached and marked Exhibit "L".

Thereupon on January 30, 1936, A. Y. Oates and his wife, Almena Oates, filed their petition for rehearing (R. 478-480), and thereafter in the January term, 1936, in the Supreme Court of the State of Florida, said court entered its order on February 5, 1936, denying said petition for rehearing as will more fully appear by reference to a copy of said order hereto attached and marked Exhibit "M".

Thereupon said A. Y. Oates and his wife, Almena Oates, filed their petition to the Supreme Court of the State of Florida seeking said court to clarify the opinion of said court filed April 5th, 1935, wherein the final decree of the Circuit Court of Polk County was reversed and in an opinion filed March 9, 1936, by said Supreme Court of Florida, said court denied said petition for clarification, as will more fully appear by reference to a copy of said opinion being hereto attached and marked Exhibit "N".

On the 15th day of July, 1936, the Honorable H. C. Petteway, Circuit Judge of Polk County, entered his final decree in said cause pursuant to the opinion of the Supreme Court of the State of Florida against A. Y. Oates and his

wife, Almena Oates, and decreeing that the mortgage held by New York Life Insurance Company should be foreclosed, as will more fully appear by reference to a copy of said final decree hereto attached and marked Exhibit "O", and A. Y. Oates and his wife, Almena Oates, entered their appeal from the said final decree to the Supreme Court of the State of Florida on August 1st, 1936 (R. 505), and in said appeal raised the question as to whether a married woman, the owner by entireties with her husband, of said real property which constitutes the homestead of the husband, is estopped from contesting the validity of a mortgage which was placed upon the homestead by the husband to secure a loan to him upon the ground that she did not appear before the Notary Public separately and apart from her husband, or at all, and before such officer acknowledged separately from her husband that she executed the instrument freely and voluntarily and without any compulsion, constraint, apprehension or fear of or from her said husband, and in an opinion filed December 22nd, 1937, at the June term, 1937, of the Supreme Court of the State of Florida, said court reversed said cause by a unanimous opinion with directions to the chancellor in accordance with said opinion, which will more fully appear by reference to a copy of the said opinion hereto attached and marked Exhibit "P", and also appearing by the order of the court entered December 22nd, 1937, a copy of which is hereto attached and marked Exhibit "Q".

New York Life Insurance Company, a corporation, moved said court for an extension of time for filing petition for rehearing and the same was granted (R. 542) and on the 31st day of January, 1938, said petition for rehearing was filed (R. 543-555) and thereafter on February 15th, 1938, the Supreme Court of the State of Florida entered its order denying said petition for rehearing, as will more

fully appear by reference to a copy of said opinion hereto attached and marked Exhibit "R".

New York Life Insurance Company filed its motion for leave to take further testimony in said cause in the Circuit Court of Polk County and on the 6th day of June, 1938, the Honorable H. C. Petteway, Judge of said Circuit Court, entered his order denying the motion of New York Life Insurance Company for leave to take further testimony, as will more fully appear by reference to a copy of said order hereto attached and marked Exhibit "S".

On June 20th, 1938, New York Life Insurance Company filed its petition for rehearing on said motion (R. 576-578), which said petition for rehearing was denied by the Honorable H. C. Petteway, Circuit Judge of Polk County, Florida, on June 30th, 1938 (R. 595).

Thereafter on September 27, 1938, the Honorable H. C. Petteway, Circuit Judge of said Court, entered his final decree on the record and evidence in said cause denying the New York Life Insurance Company the right to foreclose said mortgage and decreeing the same to be invalid, void and of no force or effect, which will more fully appear by reference to a copy of said final decree hereto attached and marked Exhibit "T".

Thereafter on December 22, 1938, New York Life Insurance Company entered its appeal to the Supreme Court of the State of Florida and on the 22nd day of December, 1939, in an opinion the Supreme Court of the State of Florida reversed the decree of the Circuit Court of Polk County and remanded the cause for an appropriate decree to be entered for the New York Life Insurance Company, as will more fully appear from a copy of said opinion hereto attached and marked Exhibit "U", and from the order of said Court hereto attached and marked Exhibit "V".

Thereafter A. Y. Oates and his wife, Almena Oates filed their petition to recall the mandate of said Supreme Court

of Florida, and to fix the time within which to file the petition for rehearing which said motion was granted by the Supreme Court of the State of Florida on January 19th, 1940, as will more fully appear by a copy of said order hereto attached and marked Exhibit "W". Thereupon on January 29th, 1940, New York Life Insurance Company filed, in the Supreme Court of Florida, its suggestion of want of jurisdiction respecting petition for recall of mandate and in an order filed by the Supreme Court of the State of Florida on January 30th, 1940, said Court denied the petition of A. Y. Oates and his wife, Almena Oates, to recall the mandate and to fix time for filing petition for rehearing, which will more fully appear by a copy of said order hereto attached and marked Exhibit "X".

Said cause being remanded to Circuit Judge of Polk County, Florida, in the opinion of the Supreme Court of the State of Florida, A. Y. Oates and Almena Oates filed in the said Court a motion questioning the jurisdiction of the trial court to enter a decree in compliance with the Supreme Court decision and mandate setting forth that the entry of a decree by the said trial court as directed by the Supreme Court of Florida would be taking the property of A. Y. Oates and his wife, Almena Oates without due process of law and would be denying the said parties the equal protection of the laws of the land—a right guaranteed every citizen of this nation by the Fifth Amendment of the Federal Constitution and by Section I of the Fourteenth Amendment to said Constitution, and further calling the Court's attention to Section Two, Article Six of the United States Constitution on the further ground that in the opinion filed by the Supreme Court of the State of Florida on the 22nd day of December, 1937, the Supreme Court in a unanimous opinion established the law of the case, that thereafter the facts in this cause were *res judicata* after said opinion and to hold in compliance with said opinion

of the Supreme Court of Florida, rendered on the 22nd day of December, 1939, would be in direct conflict and violation of the mandatory requirements of the Florida Constitution and violative of the United States Constitution. On March 1, 1940, said trial Court entered its final Decree against A. Y. Oates and his wife, Almena Oates, decreeing the validity of the mortgage in question and foreclosing the same, as will appear by reference to a copy of said decree hereto attached and marked Exhibit "Y".

Thereupon A. Y. Oates and his wife, Almena Oates, entered their appeal on March 21st, 1940, to the Supreme Court of Florida and set forth therein in the assignments of error that the trial court was without jurisdiction; that it entered its Decree in compliance with a void Supreme Court decision and mandate; that the unanimous decision of the Supreme Court of Florida rendered on the 22nd day of December, 1937, and reported in 178 Southern Reporter 570 and hereto attached as Exhibit "P", became and was the law of the case, and that the trial court erred in not holding the facts of this cause *res judicata* and the law of the case settled by said Supreme Court of Florida decision (R. 673-674).

Thereafter New York Life Insurance Company filed their motion to dismiss the appeal or affirm the final decree of the lower court on June 17th, 1940, whereupon on June 24th, 1940, the Supreme Court of Florida entered its order on said motion requiring briefs to be filed in the support of said motion (R. 680) and in an opinion filed November 12th, 1940, at the June term, 1940, of Supreme Court of Florida, the said Court affirmed the decree of the trial court, as will more fully appear from a copy of said opinion hereto attached and marked Exhibit "Z".

Thereupon A. Y. Oates and Almena Oates, his wife, filed their petition for rehearing in said cause before the Su-

preme Court of Florida, which said petition on December 7th, 1940, the June term of the Supreme Court of Florida, was denied as will more fully appear from a copy of said order hereto attached and marked Exhibit "AA".

Thereafter A. Y. Oates and Almena Oates, his wife, on December 18th, 1940, filed an application to recall the mandate and also for order staying any further proceedings in said cause (R. 702-703), whereupon the Supreme Court of Florida in an order dated December 19, 1940, June term of said Court 1940, recalled the mandate in said cause stayed further proceedings in said cause and required A. Y. Oates and Almena Oates to give bond, in the sum of Two Hundred Fifty Dollars ($250.00) condition to prosecute diligently the certiorari proceeding to a final determination to the Supreme Court of the United States, and further conditioned that should said petition for certiorari be denied by the Supreme Court of the United States or the cause decided adversely to the appellants, said parties to pay all costs that may have incurred or accrued in said proceeding, as will more fully appear by reference to a copy of the said order of said Supreme Court of Florida hereto attached and marked Exhibit "BB".

Statement Particularly Disclosing the Basis on Which it is Contended the Court Has Jurisdiction to Review the Judgment of the Supreme Court of Florida.

This cause is presented to this Court under provisions of the act of February 13, 1925, being Chapter 229, 43 Stat. 936 (as amended). The section of the Judicial Code relied upon is "Section 237 (b)":

> "It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been

rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

The constitutional provision which has been violated in this cause to the injury of the petitioner is Article 14, Section 1, of the United States Constitution, the appurtenant part of which is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The petitioner also invokes Article 5 of the Dec. of Rights of the United States and shows to this Court that in this proceeding her rights guaranteed by this section of the United States Constitution has been violated. This article of the Constitution is in the following language:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

> the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This appeal is taken from that certain opinion, order and judgment of the Supreme Court of Florida entered in this cause on November 12, 1940 (R. 682 to 688, inclusive), rehearing being denied by the Supreme Court of Florida on December 7, 1940 (R. 701), a copy of which opinion of the Supreme Court of Florida is hereto attached marked Exhibit "Z", and also a copy of the order denies rehearing is hereto attached, marked Exhibit "AA".

This cause originated in the Circuit Court of the Tenth Judicial Circuit of Florida and for Polk County, a copy of which Final Decree is shown (R. 249-254, inclusive), copy of which is hereto attached, marked Exhibit "A".

From this decree an appeal was duly taken to the Supreme Court of Florida and the Supreme Court of Florida on January 4, 1934, filed its opinion and judgment reversing the judgment of the Circuit Court (R. 271-272).

Additional testimony was taken in the cause and the Circuit Court on the third day of August, 1934, did make and enter its final decree in said cause and by said decree did dismiss the Bill of Complaint, (R. 400-404, inclusive).

The cause was then appealed to the Supreme Court of Florida and on April 5, 1935, the Supreme Court of Florida filed its opinion and judgment affirming the decree and judgment of the Circuit Court (R. 426-427). Copy of which is hereto attached and marked Exhibit "F".

The matter came before the Supreme Court of Florida again and the Supreme Court of Florida rendered its

opinion (R. 436-443), copy of which is hereto attached, reversing the decree of the Circuit Judge.

Two of the justices dissented, one of whom, Mr. Justice Brown, wrote a dissenting opinion (R. 444-447, inclusive), copy of which is hereto attached.

Mr. Justice Buford also wrote a dissenting opinion, copy of which is hereto attached (R. 448).

Mr. Justice Ellis concurred in the opinion of Mr. Buford, copy of which concurrence is hereto attached (R. 449).

New hearing was applied for in the Supreme Court and on January 13, 1936, the Supreme Court of Florida filed its judgment of opinion and order, on application for rehearing, reversing the decree of the chancellor, copy of which opinion is hereto attached, marked Exhibit "M" (R. 474-475).

Petition was filed in the Supreme Court of Florida asking the court to clarify its last opinion and on March 9, 1936, the Supreme Court of Florida entered its order and opinion, a copy of which order and opinion is hereto attached, marked Exhibit "N" (R. 487-488).

On the 15th day of July, 1936, the Circuit Court in obedience to the mandate of the Supreme Court entered final decree in the cause, a copy of which final decree is hereto attached, marked Exhibit "O" (R. 495-505). From this appeal was entered to the Supreme Court of Florida and on December 22, 1937, the Supreme Court of Florida filed its opinion and judgment in said cause, copy of which is hereto attached, marked Exhibit "P" (R. 518-536).

We call the Court's attention to the fact that the latter opinion of the Supreme Court of Florida was unanimous, being concurred in by all six members of the court.

Petition for rehearing was filed (R. 543-555).

The court upon consideration of application for rehearing did deny the same (R. 557).

Supplementary Transcript of record was filed (R. 561-615). The Supreme Court of Florida on the 22nd day of December, 1939, filed its opinion in this cause, a copy of which opinion is hereto attached (R. 623-634).

On March 1, 1940, the Circuit Court did enter its final decree, a copy of which is hereto attached as Exhibit "Y" (R. 660-669).

On the 10th day of June 1940 the appellants, A. Y. Oates and his wife, Almena Oates, filed in the Supreme Court of Florida a fourth supplementary record (R. 653-676, inclusive).

Upon further consideration the Supreme Court of Florida on November 12, 1940 filed its opinion and judgment, a copy of which opinion and judgment is hereto attached, marked Exhibit "Z". (R. 682 to 688 inclusive).

It is not denied that the property involved in this litigation and upon which it was attempted to foreclose the mortgage, was long prior to the execution of the mortgage, the homestead of A. Y. Oates and Almena Oates, his wife. It is in the record without dispute that Mrs. Oates never at any time acknowledged her signature to the mortgage which was attempted to be foreclosed. It is clearly shown by the record that she did not know at the time A. Y. Oates executed the mortgage that she was signing a mortgage covering her homestead or in fact that there was a mortgage at all.

The Constitution of Florida under title "Homesteads", Section 1, provides, Article 10, Section 1: "A homestead * * * shall not be alienable without the joint consent of husband and wife when that relation exists."

The Constitution of Florida also provides, "Article 10, Section 4": "Nothing in this Article shall be construed to prevent the holder of the homestead from alienating her homestead by deed or mortgage duly executed by himself or herself, and by husband and wife as such relation exists."

Article 11, Section 1, of the Constitution of Florida also

provides, "Article 11, Section 1": "All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterward by gift, device, bequest, descent or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing, executed according to the law respecting conveyances by married women."

The record conclusively shows without dispute that the title to this property involved in this foreclosure was an estate by the entireties, the same being owned jointly by A. Y. Oates and Almena Oates, his wife.

Pursuant to the authority of the last quoted section of the Constitution of Florida the Legislature of Florida in adopting the Compiled General Laws of Florida of 1927, carry farther and include therein the following provisions of law:

"5676". (3803) "Married Women's Acknowledgments."

"To render such sale, conveyance, mortgage or relinquishment, whether of separate estate or of dower, effectual to pass a married woman's estate or right, she must acknowledge, before some officer authorized to take acknowledgment of deeds, separately and apart from her husband, that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband, and the officer's certificate shall set forth all the foregoing requirements."

We submit to the court that to substantiate the foreclosure of this mortgage and thereby take from Almena Oates her property under the circumstances shown, is the taking of her property in violation of the constitutional provisions of court in that it admits to the taking of her property without due process of law; the law having fixed the manner and means of which she might be deprived of her property, thus we also call the Court's attention to the fact that if a married woman's property rights can be taken in any such

manner, then no married woman in Florida will be safe in their property rights because this Court knows that as a rule women are not educated in a business way and these provisions of law were made to protect the innocent and not to be used as a shield. If the insurance company making this loan employs attorneys or agents to look after the execution of their mortgages, they are dealing by or through men accustomed to business transactions and who are familiar with the provisions of law and have ample opportunity to exercise a small caution to see that any legal papers that they may handle are executed as required by law. Certainly it was the intention of the framers of the Constitution of the United States and of the Constitution of Florida to throw a safe-guard around women for their protection in their property rights.

We call the court's attention further to the fact, although not the size of this case, but highly persuasive, that the Supreme Court of Florida in the opinion of the Court, filed December 22, 1937 (R. 518-536) and hereto attached as Exhibit "P", which opinion was concurred in by all six of the Justices of the Supreme Court of Florida, clearly and conclusively and finally settled the law of the case in favor of Almena Oates and A. Y. Oates, her husband, the court having held in this opinion that the mortgage so executed without the separate acknowledgment of the married woman, was void and having further said in the opinion that she was not estopped to deny that she did so acknowledge the execution of the mortgage, it is difficult for one to fathom the reasoning or to discover the logic in the final opinion of the Supreme Court of Florida in which opinion to our mind the court absolutely reversed in every respect the judgment and conclusion as set forth in this unanimous opinion of the court from which we have quoted, the latter opinion being found in R. 682 to 688, copy of which is being attached hereto as Exhibit "Z".

Questions Presented.

QUESTION 1. Where the wife signs a mortgage with no knowledge of the contents conveying the homestead; but did not sign in the presence of two witnesses and did not separately acknowledge her signature before a notary public or any other officer authorized to take acknowledgments; Section 1 of Article 10 of the Constitution of Florida provided that homestead cannot be alienated without the joint consent of husband and wife, and pursuant to the Constitution of Florida the Legislature of Florida, Section 5676 of the Compiled General Laws of Florida 1927, requiring two witnesses to the signature of the mortgagor and requiring that the wife be examined separately and apart from her husband, by an officer authorized to take acknowledgments, in order to constitute the same a valid mortgage:

Was the holding of the State Courts of Florida foreclosing the said mortgage and ordering the sale of the same in violation of Article 14, Section 1, of the Constitution of the United States quoted *supra* and did it amount to taking the private property without due process of law?

QUESTION 2. Under the above facts, was the holding of the State Court in effect, a violation of Article 14, Section 1, of the Constitution of the United States, and did the holding deny to Almena Oates the equal protection of the law?

QUESTION 3. Under the facts stated in the first question, did the holding of the State Court violate Almena Oates' rights, secured to her under Article 5 of the Constitution of the United States in that the holding of the State Courts would deprive her of her property without due process of law?

QUESTION 4. The Supreme Court of Florida by a unanimous opinion filed December 22, 1937, the same being hereto attached as Exhibit "P", in a well written opinion decided

all legal questions in favor of A. Y. Oates and Almena Oates and also fully discussed and decided in their favor all questions of fact material to the issue; and thereafter a rehearing was denied and this opinion became final. The cause was remanded to the Trial Court and a decree was entered in conformity with the holding of the Supreme Court holding in favor of A. Y. Oates and his wife, Almena Oates, and denying foreclosure of the mortgage for the reasons stated in the opinion of the Supreme Court of Florida. This being true and the law of the case being thereby settled the Supreme Court of Florida was without authority under their own holdings to alter or change that opinion and when subsequently they did in the opinion appealed from, hold to the contrary did they thereby in effect deprive Almena Oates of her property rights without due process of law?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

As the Court can determine from the Summary of the case given herein as well as from certain portions of the testimony that will be hereinafter quoted, there is no evidence whatsoever in the record that Mrs. Oates participated in the reception of the loan or the benefits derived from it. Neither is there any evidence in the record that either by her conduct or by her words did she induce Telfair Stockton and Company to make the loan to her husband upon the faith of the security represented by the mortgage involved in this controversy, nor that she participated in any manner in the transaction by which the loan was secured. From the evidence as disclosed by the record which the Trial Court found to be true, she merely at the request of her husband, signed the mortgage without knowing for what purpose it was executed or upon what property it purported to constitute a lien. She was not even aware, as the Trial Court found, that the property described was the homestead which was held by her and her husband by the entireties.

Further the evidence fully sustains the finding of the Trial Court that the wife did not appear before the Notary Public making the certificate of acknowledgment; did not appear before any notary public and did not make an acknowledgment of the execution of the mortgage.

The Supreme Court of Florida found the above facts to be true as stated in their unanimous opinion filed December 22, 1937, which opinion is hereto attached and marked Exhibit "P".

It is the contention of appellant that when the Supreme Court of Florida rendered its opinion above referred to that the law of the case was settled and we call the court's attention to the fact that after the rendition of said opinion by the Supreme Court of the State of Florida no further testimony was taken in this case. The testimony of Mr. Pickard, one of the witnesses to the signature of A. Y. Oates and Almena Oates, his wife, on the mortgage, testified as follows:

Q. "Mr. Pickard, whose signature did you witness to this mortgage?
A. A. Y. Oates.
Q. Was he the only one who signed it before you?
A. Yes, sir.
Q. Mrs. Oates didn't appear and sign it at the time?
A. No" (R. 150).

The testimony of Mrs. Oates is as follows:

Q. "Did you get any money from this mortgage at all?
A. No, sir, I did not.
Q. Now, there is a certificate on here (speaking of the mortgage) signed by Leon McGowan as a Notary Public, purporting to take your acknowledgment of this mortgage. Did you go before her at all?

(Objection.)

Q. Mrs. Oates, did you appear before Leon McGowan at the time she made that certificate?

A. No I didn't.

Q. Did you appear at any time to sign this mortgage before any notary?

A. I did not" (R. 153-154).

Mr. H. C. Fuller, called on behalf of appellant, testified that he was in the Oates' home working on some books for Mr. Oates and although he did not sign the mortgage herein involved as a witness the following incident occurred in his presence. Asked to explain the circumstances of how Mr. and Mrs. Oates signed the mortgage, he answered: "I was working on the books out at the house at Mr. Oates' residence. He called me over the telephone to come to the furniture store at once, we were driving a Hudson car together, I went to the furniture store, drove Mr. Oates back to the house. Mr. Oates stepped over to the desk, we had the office in his bedroom, stepped to the desk, signed the mortgage, handed it to Mrs. Oates, Mrs. Oates was sick in bed. Mrs. Oates raised up and signed the mortgage on a book.

Q. Were you present in the room when Mr. and Mrs. Oates signed the mortgage?

A. Absolutely.

Q. Was anyone else present?

A. No one.

Q. Then Mr. A. F. Pickard and Leone C. McGowan, whose names appear as witnesses were not present when Mr. and Mrs. Oates signed the mortgage?

A. Absolutely not."

The witness testified that he went to Mr. Pickard's office with Mr. Oates and testified as follows:

Q. "Was Mrs. Oates in Mr. Pickard's office when Miss McGowan purportedly took the acknowledgment?

A. No, sir.

Q. Where was Mrs. Oates?

A. Mrs. Oates was home in the bed sick.

Q. Then I gather from your testimony that when this mortgage was witnessed and acknowledged that

Mrs. Oates was not present before either one of the parties.

A. No" (R. 332-333).

Miss Leone C. McGowan, the Notary Public who allegedly took the acknowledgment of Mr. Oates and Mrs. Oates, testified:

Q. "Have you any independent recollection of Mr. and Mrs. Oates appearing before you?

A. No, sir.

Q. Does the same testimony relative to the acknowledgment apply to your signature as a witness?

A. Yes, sir" (R. 315-316).

In other words, the witness at the time she testified didn't recall Mr. and Mrs. Oates appearing before her to take the acknowledgments as aforesaid, nor that either one of said parties appeared before her and signed the same.

Mr. A. F. Pickard, who is the only other witness who signed the mortgage as a witness, testified as follows:

Q. "Mr. Pickard, whose signature did you witness to this mortgage?

A. A. Y. Oates.

Q. Was he the only one who signed it before you?

A. Yes, sir.

Q. Mrs. Oates didn't appear and sign it at the time?

A. No" (R. 150).

The same witness further testified that Mrs. Oates' name was written on the paper at the time he signed the same as a witness (R. 152).

Under Sections 5698, 5699, and 5700 of the Compiled General Laws of Florida of 1927, in order to have a mortgage instrument duly recorded the execution of the mortgage instrument must be acknowledged by the parties executing the instrument, or the execution thereof by such parties must be proven by a subscribing witness thereto before an authorized officer; and the certificate of the officer before whom

the acknowledgment of proof shall be taken shall contain and set forth substantially the matter required to be done and proved to make such acknowledgment of proof effectual. The Florida Courts have heretofore held that where in a suit to foreclose a mortgage it is admitted or duly proven that the mortgage was signed by both the husband and the wife but it is averred as a defense that the wife did not appear before or acknowledge the execution of the mortgage before the officer whose certificate states that she did so appear and acknowledge the execution of instrument, then such averment as a defense may be proven by convincing evidence. *Hutchinson* v. *Stone,* 79 Fla. 157, 84 So. 151; *Randall* v. *Twitchell,* 98 Fla. 559, 124 So. 21; *Morris* v. *Shepard,* 104 Fla. 121, 139 So. 189; *Smith* v. *Hogan,* 117 Fla. 82, 157 So. 183; *Suttle* v. *Wold,* 117 Fla. 802, 158 So. 447.

Article 10, Section 1 of the Constitution of Florida, provides that the homestead shall not be alienable without the joint consent of husband and wife when that relation exists and Section 4 of the same Article provides that the alienation of the homestead may be made by the husband and wife when that relation exists. Further in the case of *Hutchinson* v. *Stone, supra,* the Florida Supreme Court held:

> "A mortgage duly executed by husband and wife sufficient to create a lien upon homestead real estate of the husband as by the mortgagors and mortgagees must be duly executed by the husband and wife and the execution by the wife duly acknowledged by her, since under the statute due acknowledgment by the wife of the execution of the deed or mortgage by her is essential to the validity of any conveyance or relinquishment of an interest in real estate by the wife even as by the parties to the instrument."
>
> See also *Murphy* v. *Duncan,* 111 Fla. 548, 149 So. 594.

Section 5676 of the Compiled General Laws of Florida of 1927 described the method at law by which a married

woman may effectually pass her estate or right in real property to a third person, and that method requires her to acknowledge before some officer authorized to take acknowledgments of deeds, separate and apart from her husband, that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband, and the officers' certificate shall set forth all the foregoing requirements. Thus, it appears that the law of the State of Florida requires the formalities set forth above to be observed in order that a married woman may alienate her separate estate by either deed or mortgage or that the homestead may be alienated in such manner.

It is without dispute in this case that Mr. and Mrs. Oates were owners of the mortgaged property herein described by the entireties and further that the same was homestead, and further that they had resided thereon with a minor child for several years prior to the execution of the mortgage.

This case was appealed to the Supreme Court of Florida five times. On what is called the "Third Appeal", Mr. Justice Ellis of the Florida Court wrote the Opinion which was concurred in by all of the Justices of the said court.

It is the contention of appellants that this Opinion hereto attached, marked Exhibit "P", settled the law of the case and that after the law of the case was settled the Supreme Court of Florida was without power to change the law of the case in a subsequent Opinion, even if it were so inclined, and if the law of the case was changed as was done in the Appeal herein appealed from, that the appellants have been denied due process of law.

Family Loan Co. v. *Metal Corp.,* 123 Fla. 900, 169 So. 48;

Palm Beach Estates v. *Crocker,* 106 Fla. 617, 143 So. 792;

Ucley v. *City of St. Petersburg,* 121 Fla. 268, 163 So. 523;

Also Vol. 1 Encyclopedic Digest of Fla. Reports, paragraphs 190, 191, pages 348, 352;
Also *South Fla. Trust Co.* v. *Miami Coliseum Corp.*, 101 Fla. 1351, 33 So. 334, 12 Am. Juris, Sec. 633, page 324.

This Court has also said that the words, "due process of law", when applied to judicial proceedings mean "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

Pennoyer v. *Neff*, 25 U. S. 714, 24 L. Ed. 565;
Scott v. *McNeal*, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 38 L. Ed. 896, 901;
Endicott Johnston Corp. v. *Encyclopedia Press, Inc.*, 266 U. S. 285, 45 Sup. Ct. 61, 69 L. Ed. 288.

We, therefore, respectfully submit to this Honorable Court that unless this Court exercises its jurisdiction in this matter that the Appellant herein, Almena Oates, will be deprived of her property without due process of law and in violation of the United States Constitutional provisions herein set forth, as well as in violation of the Florida Constitution and Statutes made pursuant thereto as herein set forth.

Respectfully submitted,

DICKENSON & DICKENSON,
W. B. DICKENSON,
by W. B. DICKENSON, JR.,
Attorneys for Appellants and Petitioners.

APPENDIX A.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY. IN CHANCERY.

No. 13201-W-427

Bill to Foreclose Mortgage and for Other Relief.

13201-W-427.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Complainant,*

versus

A. Y. OATES and Wife, ALMENA OATES, *Defendants.*

Final Decree.

This cause came on to be heard upon the Motion of the complainant for the entry of a Final Decree of foreclosure and sale, and upon the Report of Testimony heretofore filed herein by the Special Master in Chancery, and upon the entire record;

And it appearing to the Court that the said Special Master in Chancery herein appointed, pursuant to that certain Order appointing a Special Master in Chancery, dated the 9th day of February, A. D. 1931, has, after due notice in writing to the solicitors of record for the respective parties of the time and place of the hearing for the purpose of taking the testimony, taken the testimony and proof adduced and offered in said cause by the respective parties, and has duly returned and filed his said Report of Testimony herein, notice of said filing having been waived by the parties, and it further appearing that the time allowed in and by said Order appointing a Special Master in Chancery, and the time allowed in the Orders extending said time, for the taking of testimony and proof of the respective parties has expired, and that said cause has been duly set down for final hearing, and that due notice in writing of the time and place of final hearing has been served upon the solicitors of record

for said defendants, and that said cause was duly argued by counsel for the respective parties and has been duly submitted by all parties to the Court for its decision, together with the briefs of counsel for the respective parties, and the Court having thereupon taken said cause under advisement;

And the Court, having duly considered the entire record in this cause and being now advised of its judgment in the premises upon the record and proof duly submitted and filed in this cause, finds that this Court has jurisdiction of the subject matter and of the parties to this litigation; that the allegations of the Second Amended Bill of Complaint are true as to a valid and subsisting mortgage in the complainant with full right to enforce the lien thereof in this proceeding but that the theory of the complainant as to subrogation has not been sustained by the evidence; that the equities of this cause are in favor of the complainant and against the defendants herein, each and every and that the complainant is entitled to the relief prayed for in its Second Amended Bill of Complaint, and that the prayers of the Second Amended Bill of Complaint should be granted as hereinafter decreed;

Now, Therefore, upon consideration thereof, It Is Considered, Ordered, Adjudged and Decreed:

1. That there is due the complainant for principal and interest the sum of Thirteen Thousand Fifty-seven and 96/100 Dollars ($13,057.96), together with interest thereon from the 1st day of April, A. D. 1930, to the date hereof, at the rate of eight per centum (8%) per annum, in the sum of $1,459.62, making the total sum of $14,517.58 due the complainant for principal and interest, and the further sum of $19.60 for the cost of re-certification of the abstract of title; and the further sum of $1,501.75 as a reasonable sum to be allowed for the services of complainant's solicitors in this cause, as and for attorneys' fees, and the complainant is further entitled to recover in this action all the costs and expenses incurred and now or hereafter taxed in this suit, including all amounts heretofore or hereafter earned by the Special Master hereunder for his lawful fees and commissions, and that all of these several sums are secured by the lien of said mortgage herein foreclosed, and the said mortgage herein foreclosed is hereby decreed and held to be

a valid and subsisting mortgage, and prior and superior to the rights, claims and interests of the defendants in the property hereinafter described and ordered to be sold in default of the payment of the sums so decreed to be due;

2. That unless the defendants herein or someone for them forthwith pay to the Special Master herein the said several sums so decreed to be due and to be paid as aforesaid, and if the several sums mentioned shall not be paid forthwith to the said Special Master, then that the mortgaged property situate in the County of Polk, State of Florida, and described in the Second Amended Bill of Complaint, to-wit:

Lots numbered Twenty-two (22) and Twenty-three (23) in Block numbered Two (2) of Casa Bella, a subdivision of Lakeland, Florida, according to map or plat thereof filed and recorded in Plat Book 8, Page 1, of the public records of Polk County, Florida, said subdivision being sometimes referred to as Everhart and Barnes Second Addition to Lakeland, Florida,

be sold to pay and satisfy such sums by said Special Master at public outcry to the highest and best bidder or bidders for cash on some legal sales day of this court during the legal hours of sale in front of the front door of the Polk County Court House, in the City of Bartow, County of Polk, State of Florida;

3. That Kerfoot Bryant, Esquire, a practicing solicitor of this court, be and he is hereby appointed as Special Master herein to execute this Decree, and that such Special Master is hereunder directed to advertise the sale to be made under this Decree, by causing notice of the time and place thereof, together with the foregoing description of the mortgaged lands and premises, to be sold hereunder, to be published once each week for four (4) consecutive weeks prior to the date of such sale in a newspaper published in said County of Polk, State of Florida;

4. That upon such sale being made as aforesaid, the Special Master shall collect and reduce to possession the proceeds of such sale, and that the complainant herein is hereby permitted and allowed at such sale to bid as it may be advised on the property to be sold at such sale, and that if

the complainant shall be the purchaser of such property at such sale, the Special Master aforesaid is hereunder authorized and directed to allow and credit the complainant on said bid for such property at such sale the sums due and payable to it by the defendants under this decree, or such portions thereof as may be necessary or required to fully pay its bid for said property.

5. That out of the proceeds of such sale, the Special Master aforesaid shall first pay:

(a) All costs and expenses of these proceedings including his own fees for such sale and including the fees allowed the complainant for the services of its solicitors herein;

(b) State, County and City taxes outstanding on the mortgaged premises;

(c) The amount hereinabove found to be due complainant for principal and interest, viz., $14,517.58 and the further sum of $19.60 for the cost of recertification of the abstract of title, together with interest on said sum from the date hereof at eight per centum (8%) per annum to the date of said sale,

and that in the event of any excess of such proceeds of sale over and above the amounts necessary to make the payments aforesaid, such overplus, if any, shall be paid into the Registry of the Court to await its further order herein, and that in case of any deficiency of such proceeds of sale, the Special Master aforesaid shall apply, the same in the order specified above as far as the same will apply, making notice and report of such deficiency and amount thereof in his report of the same to this Court.

6. That upon the sale being made as aforesaid, the Special Master herein shall forthwith report the same, and all of his acts and doings in connection with the execution of this decree, to this Court, for confirmation and approval thereof.

7. That upon such sale being made as aforesaid, and upon the confirmation thereof by this Court, the defendants, A. Y. Oates and Almena Oates, his wife, and all other persons having or acquiring any interest in said mortgaged property since the commencement of this suit, and all persons claiming by, through or under said defendants, or any of

them, all and singular, be forever barred and foreclosed of and from any and all right, title, interest or equity of redemption in the mortgaged property aforesaid, and every part thereof, and the Special Master shall execute and deliver a good and sufficient deed conveying said lands to the purchaser at such sale, and that upon the production of said Special Master's Deed and a duly certified copy of this decree, all persons in possession of said property, or any part thereof, do surrender and deliver up the same to the purchaser at such sale, or to his agent or servants thereunto duly authorized.

8. That this Court hereby retains jurisdiction of this cause and grants permission to the complainant to apply to this Court for such further orders and decrees herein as may be equitable and necessary.

9. That Kerfoot Bryant, Esquire, as Special Master herein, be and he is hereby allowed the sum of $116.10 for making the Report of Testimony hereinabove referred to and for his services to date as such Special Master.

Done and Ordered In Chambers at Bartow, Polk County, Florida, this 26th day of August, A. D. 1931.

HARRY G. TAYLOR,
Judge of Said Court.

APPENDIX B.

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1933.

Division B.

A. Y. OATES, and His Wife ALMENA OATES, *Appellants,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellee.*

OPINION—Filed January 4, 1934.

An Appeal from the Circuit Court for Polk County, Harry G. Taylor, Judge.

Ira C. Hopper, for Appellants.

Bradford G. Williams, Richard M. Naylor, Raymond D. Knight, John M. McNatt and Knight, Adair, Cooper & Osborne, for Appellee.

PER CURIAM:

We have examined the record and briefs filed in this case and have also heard the questions involved presented by counsel in oral argument.

The decree appealed from was entered on the 26th day of August, 1931. Since that time the controlling questions involved in this appeal have been determined in accordance with the contentions of the appellants by this Court in the cases of Menendez, et al. *v.* Rodriguez, opinion filed July 18, 1932, 106 Fla. 214, 143 Sou. 223, and McEwen et ux *v.* Schenck, opinion filed January 18, 1933, reported 146 Sou. 839.

We do not mean to hold that subscribing witnesses to a written instrument or an officer who the instrument shows to have taken the acknowledgment can be heard to impeach their respective certificates.

Therefore, the decree appealed from should be reversed and the cause remanded for further proceedings. It is so ordered.

Reversed and remanded.

Davis, C. J. and Whitfield, Terrell and Buford, J. J. and Hutchinson, Circuit Judge, concur.

Brown, J., not participating because of illness.

APPENDIX C.

IN THE SUPREME COURT OF FLORIDA.

January Term, A. D. 1934.

A. Y. OATES, and His Wife ALMENA OATES, *Appellants,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Appellee.*

OPINION—Filed February 7, 1934.

An appeal from the Circuit Court for Polk County, Harry G. Taylor, Judge.

Ira C. Hopper, for Appellants;

Bradford G. Williams, Richard M. Naylor, Raymond D. Knight, John M. McNatt and Knight, Adair, Cooper & Osborne, for Appellee.

BUFORD, *J.*:

Motion for rehearing has been filed in this case in which it is contended that because the appellee was a bona fide purchaser for value and before maturity and without notice, the rules enunciated in the opinion cited in which original opinion was filed January 4, 1933, are not applicable.

The property embraced in the mortgage is shown to have been a homestead and, therefore, for the mortgage to be valid, it must have been executed in compliance with Section 4, Article X of the Constitution, which provides as follows:

"A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists." Sec. 1, Article X.

"Nothing in this article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists." Sec. 4, Article X, Constitution.

The words, "by deed or mortgage duly executed * by husband and wife, if such relation exists" means by deed or mortgage executed as the statutes require deeds and mortgages executed by husband and wife to be executed, viz.: "by deed in writing signed, sealed and delivered in the presence of at least two subscribing witnesses". Sec. 5660 (3787) C. G. L. See form of warranty deed, and effect when signed by a married woman. Secs. 5661, 5662, 5663, C. G. L. As to proof of execution for recording purposes see sections 5698-5700 C. G. L.

"Any married woman owning real property may sell, convey or mortgage it as she might do if she were not married, provided her husband join in such sale, conveyance or mortgage." Sec. 5674 (3801) C. G. L.

"To render such sale, conveyance, mortgage or relinquishment, whether of separate estate or of dower, effectual to pass a married woman's estate or right, she must acknowledge, before some officer authorized to take acknowledgment of deeds, separately and apart from her husband, that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband, and the officer's certificate shall set forth all the foregoing requirements." Sec. 5676 (3803) C. G. L.

There may be a homestead in which husband and wife have an estate by the entireties. Menendez *v.* Rodriguez, 106 Fla. 214, 143 So. 223. A mortgage upon such a homestead must be "duly executed" by husband and wife, viz.: "by deed in writing signed, sealed and delivered in the presence of at least two subscribing witnesses" and the wife "must acknowledge, before some officer authorized to take acknowledgment of deeds, separately and apart from her husband, that she executed the same freely and voluntarily and without compulsion, constraint, apprehension or fear of or from her husband, and the officer's certificate shall set forth all the foregoing requirements." See McEwen *v.* Schenck, — Fla. —, 146 So. 839.

"The statute authorizing the private examination of the wife to bar dower is a substitute for the proceeding at common law to bar dower by fine and recovery. As against a mortgage of the fee of the husband, which mortgage was accompanied by the relinquishment of the dower of the wife, an acknowledgment thus made cannot be impeached by her testimony alone. Such an acknowledgment may be impeached for fraud, but the proof to sustain such charge must be of the clearest, strongest and most convincing character." Hart *v.* Sanderson's Administrators, 18 Fla. 103, H. N. 4.

"When a married woman has appeared before a magistrate having signed a deed and acknowledged it, and he certifies a full compliance with the statute, his certificate,

except fraud beshown, must be held conclusive of the facts it asserts." Shear *v.* Robinson, 18 Fla. 379, H. N. 1.

Where a married woman actually appears before an officer authorized to take acknowledgments, and she purports to make an acknowledgment of the execution of a mortgage or conveyance of land, and the certificate of the officer complies with the law, such certificate cannot be impeached except for fraud or duress clearly established. Forssell *v.* Carter, 65 Fla. 512, 62 So. 926; Bank of Jennings *v.* Jennings, 71 Fla. 145, 71 So. 31; Shad *v.* Smith, 74 Fla. 324, 76 So. 897; Herald *v.* Hardin, 95 Fla. 889, 116 So. 863.

But, if a married woman does not in fact appear before an officer authorized to take acknowledgments, there is no jurisdiction or authority to take such acknowledgment, and a certificate by an officer that an acknowledgment was made before him is a nullity.

Statements contained in McClure *v.* Am. Nat. Bank of Pensacola, 67 Fla. 32, 64 So. 427, have been qualified by the principles stated in Hutchinson *v.* Hutchinson, 79 Fla. 157, 84 So. 151, and other subsequent cases. Flowers *v.* Scheneck, — Fla. —, 148 So. 581.

In McEwen *v.* Schenck, — Fla. —, 146 So. 839, the decree was reversed because the Chancellor did not determine the probative force of the testimony as to the due acknowledgment of the execution of the instrument by a married woman.

In this case the Chancellor struck evidence as to the due acknowledgment by a married woman of her execution of a mortgage on homestead real estate and the Chancellor also denied a rehearing to consider supporting testimony as to such due acknowledgment. This was error.

When the due execution and acknowledgment of a deed or mortgage by a married woman is an essential element in determining a cause, appropriate testimony on the subject within the issues should be adduced and considered that justice may be done and litigation terminated.

The petition for rehearing is, therefore, denied.

Whitfield and Terrell, J. J. Concur.

Davis, C. J. concurs specially.

DAVIS, *C. J.* Concurring.

I concur with this observation: Where a certificate of acknowledgment recites affirmatively that the parties *did* appear before the officer, jurisdiction is presumed and such certificate of acknowledgment is to be taken as a quasi-judicial record which cannot be over-thrown, except upon clear and convincing affirmative evidence to the effect that the officer's certificate is in effect a pure fabrication. In other words, the falsification or fabrication of a certificate of acknowledgment is a fraud for which a remedy exists. But every presumption of law and of fact is in favor of the verity of the recited facts specified in an acknowledgment, and a certificate of acknowledgment in proper form should be sustained by and through its own force and effect as evidence, unless clearly and affirmatively impeached.

APPENDIX D.

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR POLK COUNTY.

Mortgage Foreclosure.

NEW YORK LIFE INSURANCE COMPANY, a Corporation, *Complainant,*

vs.

A. Y. OATES and His Wife, ALMENA OATES, *Defendants.*

Final Decree.

The above and foregoing cause coming on for final hearing, the evidence in said cause and the records were submitted to the Court and the cause was argued by the solicitors for the respective parties.

It appears from the record and from the argument of counsel that the only question left to be determined by the Court in this cause at this time is the sole question as to whether or not Almena Oates, the wife of A. Y. Oates, ap-

peared before the notary public and acknowledged the execution of the mortgage in question. If she appeared before the notary, then the notary's certificate is conclusive and the mortgage must be held to have been validly executed. If she did not appear before the notary public then he had no jurisdiction to make a certificate and his certificate is a nullity and the mortgage is invalid.

There is no question in this cause but that Mr. and Mrs. Oates both signed the mortgage and there is no question of duress or fraud in procuring the signature of Mrs. Oates. Likewise, there is no question but that Mr. Oates got the money secured, or attempted to be secured, by the mortgage. Likewise, there is no question but that Mr. Oates took the mortgage from the office of Telfair Stockton Company to have same executed and returned same to the Telfair Stockton Company signed by himself and wife and showing on its face to be properly witnessed and acknowledged. The property described in the mortgage, the Court finds to be the homestead of the defendant, A. Y. Oates. He is the head of a dependent family, residing in the dwelling house on said property with his wife, and was the head of a dependent family and residing in the residence on said property with his wife at the time the application for the said loan was made and prior thereto, and from then continuously during the period of the negotiations of said loan and of the closing of said loan and of the execution and delivery of the said mortgage, and until the time of the taking of the testimony herein. It is not even contended by counsel for complainant that these are not the facts. It was heretofore contended that this property being an estate in entireties could not constitute a homestead, but the Supreme Court of Florida in a previous decision of this same case held adversely to the contention of the complainant, and therefore there can be no question but that it is and was the homestead of A. Y. Oates and that he and his wife were residing there when the mortgage was allegedly executed. Also it was contended heretofore by complainant in this cause that the transfer or assignment of said note and mortgage by the original mortgagee to the complainant precluded the consideration of any claim by the defendants that